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Washington, D.C. 20463

2004 MAR 15 P 2: 06

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5378

DATE COMPLAINT FILED: July 17, 2003

DATE OF NOTIFICATION: July 24, 2003

DATE ACTIVATED: February 2, 2004

EXPIRATION OF STATUTE OF LIMITATIONS:
October 3, 2005

COMPLAINANTS:

John Hagelin
Ralph Nader
Patrick Buchanan
Howard Phillips
Winona LaDuke
Natural Law Party
Green Party of the United States
Constitution Party

RESPONDENT:

Commission on Presidential Debates

**RELEVANT STATUTES
AND REGULATIONS¹**

2 U.S.C. § 431(9)(B)(ii)
2 U.S.C. § 433
2 U.S.C. § 434
2 U.S.C. §§ 441a(a) and (f)
2 U.S.C. § 441b(a)
11 C.F.R. § 100.92
11 C.F.R. § 100.154
11 C.F.R. § 110.13
11 C.F.R. § 114.4(f)

INTERNAL REPORTS CHECKED:

None

FEDERAL AGENCIES CHECKED:

None

¹ 11 C.F.R. §§ 100.92 and 100.154 were previously codified at §§ 100.7(b)(21) and 100.8(b)(23) during the 2000 election cycle.

1 **I. INTRODUCTION**
2

3 In this matter, several third parties and their 2000 candidates challenge the eligibility of
4 the Commission on Presidential Debates ("CPD") to stage presidential and vice-presidential
5 debates, both retrospectively, in 2000 and prospectively, in 2004. Previously, in MURs 4987 and
6 5004, the Commission rejected eligibility challenges, and courts in the ensuing dismissal suits
7 found in favor of the Commission. Complainants here repeat some of the same assertions made
8 in the previous MURs. However, they also proffer what they term "newly obtained evidence"
9 stemming from the CPD's decision to exclude third-party candidates from debate audiences in
10 2000. Complainants contend that as a result of the CPD's alleged ineligibility to stage candidate
11 debates, the CPD has violated several provisions of the Federal Election Campaign Act of 1971,
12 as amended (the "Act") from which it would otherwise be exempted. For the reasons discussed
13 below, this Report recommends that the Commission find no reason to believe that the CPD
14 violated the Act and close the file.²

15 **II. DISCUSSION**

16 Since 1988, the CPD, a nonprofit corporation, has staged candidate debates pursuant to
17 2 U.S.C. § 431(9)(B)(ii)'s safe harbor, which exempts from the definition of "expenditures"
18 "nonpartisan activity designed to encourage individuals to vote or register to vote." Commission
19 regulations provide that "[n]onprofit organizations described in 26 U.S.C. 501(c)(3) or (c)(4) and
20 which do not endorse, support, or oppose political candidates or political parties may stage

² On February 11, 2004, complainants filed a suit in federal district court against the Commission, alleging that it had not acted upon their complaint within the time prescribed by 2 U.S.C. §§ 437g(a)(8)(A) and (C). *Hagelin, et al. v. FEC*, Case No. 1:04cv00202 (HHK). Service of the complaint on the Commission was perfected on February 18, 2004.

1 candidate debates in accordance with this section and 11 C.F.R. 114.4(f)." 11 C.F.R.
2 § 110.13(a)(1).³ See also 11 C.F.R. §§ 100.92 and 100.154 (exempting funds used to defray
3 costs incurred in staging candidate debates in accordance with the provisions of 11 C.F.R.
4 §§ 110.13 and 114.4(f) from the definitions of "contribution" and "expenditure," respectively).

5 Thus, if the debate staging organization meets the requirements of section 110.13(a)(1), and
6 stages debates in accordance with sections 110.13(b) and (c) and 114.4(f), the organization's
7 activities are exempt from the definitions of "contribution" and "expenditure."

8 Complainants, who challenge only the CPD's eligibility to stage debates pursuant to
9 2 U.S.C. § 431(9)(B)(ii) and 11 C.F.R. § 110.13(a)(1), contend that the CPD's alleged
10 ineligibility subjects it to provisions of the Federal Election Campaign Act of 1971, as amended
11 (the "Act"), from which it would otherwise be exempt. Specifically, complainants allege that the
12 CPD, as a corporation, cannot legally make contributions or expenditures, see 2 U.S.C.
13 § 441b(a). By inference, complainants appear to allege that CPD made prohibited corporate
14 contributions to the Bush-Cheney and Gore-Lieberman campaigns in connection with the 2000
15 debates. Alternatively, they allege, the CPD is a political committee, in which case its failure to
16 register and report pursuant to 2 U.S.C. §§ 433 and 434 is a continuing violation of the Act.
17 Under this theory, by inference, complaints allege CPD made excessive contributions to the
18 Bush-Cheney and Gore-Lieberman campaigns in 2000. They also allege that CPD received
19 excessive and corporate contributions. See 2 U.S.C. §§ 441a(a), 441a(f) and 441b(a). Complaint
20 at 2, 4, 7-8.

³ 11 C.F.R. §§ 114.4(f)(1) and (3) provide that corporations staging debates in accordance with 11 C.F.R. § 110.13 may use their own funds to do so, and may also accept donations from other corporations and labor organizations for the purpose of staging the debates.

Complainants seek to attack the CPD's eligibility to stage nonpartisan debates by asserting that the CPD is in fact a partisan organization that "by its consistent pattern of exclusionary behavior and actions, did 'endorse, support or oppose political candidates or political parties.'" Complaint at 7, 9. In support, complainants advance two arguments. First, complainants maintain that "[t]he CPD was founded, and is controlled by the Republican and Democratic Parties and their representatives," *id.* at 4-5, citing the alleged partisan composition of CPD's board of directors and the CPD's founding by co-chairs who were, at that time, chairmen of the Republican National Committee ("RNC") and the Democratic National Committee ("DNC"), respectively. These assertions, however, were previously advanced in MURs 4987 and 5004. In those MURs, the Commission found no reason to believe that the CPD had violated the Act, and in subsequent section 437g(a)(8) dismissal suits brought by the MUR 4987 and 5004 complainants, courts found for the Commission.⁴ Complainants' first argument, therefore, should be rejected.

⁴ In *Buchanan v. FEC*, 112 F.Supp.2d 58 (D.D.C. 2000), *aff'd on different grounds*, No. 00-5337 (D.C. Cir. September 29, 2000) ("*Buchanan*"), brought by complainants in MUR 4987, the court stated that "the General Counsel found, and the FEC agreed, that plaintiffs failed to provide enough evidence to establish a reason to believe that the CPD" did not meet the eligibility requirements of 11 C.F.R. § 110.13(a)(1), noting that, among other things, the "General Counsel determined that plaintiffs' evidence failed to show . . . that the 'CPD is controlled by' the two major parties." 112 F.Supp.2d at 70-71. The court further stated that the evidence submitted by plaintiffs included the founding of the CPD in 1985 by its two co-chairs who were then the respective chairmen of the RNC and the DNC and the composition of CPD's board as consisting largely of current and former elected officials of the two major parties and party activists. *Id.* at 71. The court concluded that "[b]ased on the factual record before it, the FEC did not abuse its discretion in finding that there was no 'reason to believe' that the CPD currently 'do[es] not endorse, support, or oppose political candidates or political parties.'" 11 C.F.R. § 110.13(a)(1)." In *Natural Law Party v. FEC*, Civ. Action No. 00CV02138 (D.D.C. September 21, 2000), *aff'd on different grounds*, No. 00-5338 (D.C. Cir. September 29, 2000), brought by complainants in MUR 5004, the court found for the Commission on the merits based on the reasoning set forth in *Buchanan*. (See Tabs D-G attached to the Response); see also *Becker v. FEC*, 230 F.3d 381 (1st Cir. 2000) (rejecting challenge by Ralph Nader and others to the Commission's debate regulations). Similar arguments were also rejected by the Commission in MUR 5207, although the matter focused more on CPD's specific selection criteria and less on CPD's eligibility to be a sponsoring organization. Although the MUR 5207 complainant subsequently brought a section 437g(a)(8) suit in the Western District of Washington, the district court dismissed the suit on procedural grounds and the Ninth Circuit affirmed the dismissal.

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1 Second, complainants point to “newly obtained evidence.” Complaint at 2. According to
2 the complaint, before the first presidential debate in 2000, “the CPD leadership decided to
3 exclude all third-party candidates from attending the presidential debate as audience members,” a
4 “decision also applied to all three of the presidential debates and presumptively the vice-
5 presidential debates.” *Id.* at 5. The complaint further alleges that CPD’s general counsel
6 prepared and distributed a “face book” of third-party candidates so that CPD personnel could
7 spot and deny the candidates access to the debate hall even if they had tickets. *Id.* The
8 complainants support these allegations with references to excerpted deposition testimony,
9 appended to the complaint, of a CPD co-chair, Frank J. Fahrenkopf, Jr., and of CPD’s general
10 counsel, Lewis K. Loss, both of whom were involved in the exclusion decision.⁵

11 The crux of complainants’ claim is that the CPD’s decision to exclude third-party
12 candidates from the 2000 debate audiences was a partisan maneuver. This allegation rests on a
13 deposition statement from Mr. Loss that “[the CPD’s] concern was that if a third-party candidate
14 who had not qualified for participation in the debate went to the trouble to get a ticket and attend
15 the debate that it would be for the purpose of campaigning in some way, which seemed to imply
16 the potential for disruption.” Complaint at 6.⁶ From this, complainants derive the conclusion

17 ⁵ These depositions were taken during discovery in a lawsuit filed by Ralph Nader against the CPD in 2000. According to press accounts, Nader sued the CPD in federal district court in Massachusetts, alleging that although he had a ticket to an auxiliary room outside the debate hall to view the debate, he was escorted by security personnel off the college campus where the debate was being held. Nader, who settled the case, reportedly received \$25,000 and a letter of apology from the CPD. Will Lister, *Nader Claims Victory in Debate Suit Settlement*, THE ASSOCIATED PRESS, April 17, 2002; Maria Recio, *Nader Settles Debate Lawsuit*, THE FORT WORTH STAR-TELEGRAM, April 18, 2002. Thus, the evidence is not exactly “newly obtained.” In fact, the exclusion of Nader from the audience of the Boston debates was referred to in passing in the complaint in MUR 5207.

⁶ According to CPD’s Responses to Interrogatories in the Nader lawsuit, debate tickets “were distributed the day of the debate to invited guests of the [CPD], the University of Massachusetts, and the campaigns of those participating in the presidential debate.” (Tab M to the Response at 12)

1 that the CPD “intended the exclusion of all third-party candidates from the debate hall to deny
2 these candidates and their parties any ‘campaigning’ opportunities.” *Id.* According to
3 complainants, although the major party candidates engaged in significant campaigning by
4 attending and participating in the televised debates, “the CPD’s decision was clearly intended to
5 deny third-party candidates any media coverage in the debate hall and/or deny them ready
6 availability to the approximately 1,700 news reporters attending the debates.” *Id.* Thus, “the
7 CPD acted as a partisan organization to intentionally provide the Republican and Democratic
8 Candidates and Parties with valuable benefits that it denied to all other third-party candidates and
9 their parties, including Complainants.” *Id.*

10 In its response, the CPD first notes that the Commission’s regulations do not suggest that
11 eligibility to sponsor candidate debates depends on who is permitted to sit in the debate audience
12 and that the federal election laws do not oblige the CPD to admit candidates not qualifying for
13 participation in the debates to the audience so that they can engage in campaigning. Response at
14 3-4. But “[e]ven if there were some theoretical set of facts where the question of who sits in the
15 audience were relevant to an organization’s eligibility to serve as a staging organization,” *id.* at 4,
16 (emphasis in the original), the CPD contends that, under the circumstances, “it is evident that the
17 decision alleged in the complaint was made for the purpose of preventing disruption of the live
18 international television broadcast of the debate,” and “had nothing to do with partisanship.”
19 Response at 5.

20 The Response states (and attaches corroborating documentation at Tabs I-L) that “in the
21 period leading up to the first presidential debate in 2000, Mr. Nader and his supporters engaged
22 in conduct that reasonably led the CPD to be concerned about the risk of disruption of the live
23 internationally televised debate,” including large rallies, cries of “Let Ralph Debate,” certain

1 public statements by Mr. Nader, and protests outside of, and a break-in into the CPD's
2 Washington, D.C. offices by Nader supporters. Response at 4. In this context, the isolated
3 reference in the Loss testimony to "campaigning" does not appear to be partisan, particularly
4 where Mr. Loss links it to "the potential for disruption"; "disruption" indicates disorderly
5 conduct, not a mere presence in an audience or access to reporters. Moreover, other sworn
6 testimony of Mr. Loss, that he "had some serious reservations about a scenario of admitting such
7 a candidate and trying to control the disruption in the context of this particular event with a live
8 television broadcast," indicates that he was concerned about the potential for disruption, not
9 partisan opportunities. *See* excerpt from Deposition of Lewis K. Loss at 48 (appended to the
10 complaint). *See also* excerpt from Deposition of Frank J. Fahrenkopf, Jr. at 45 (appended to the
11 complaint) (he thought Mr. Nader might "stand up in the audience, stand up on a chair and say,
12 oh, I could be on that stage, why won't you let me on the stage. That's what I was concerned
13 about. And I felt that would be extremely disruptive").

14 The issue presented by the complaint is not whether CPD's exclusion decision was a
15 good one, or even whether its fears of disruption were well-founded. The issue is whether there
16 is a sufficient basis to conclude the decision may have been animated by partisanship. There is
17 not. The complaint's allegations as to the CPD's motivation are based entirely upon taking the
18 word "campaigning" from its context in the surrounding circumstances and of the sentence in
19 which it appears, and asserting that this word, in and of itself, establishes a partisan motivation.
20 The CPD, on the other hand, has presented substantial information indicating that its decision
21 was based on concerns of potential disruption during live television broadcasts, not partisanship.
22 Moreover, CPD's position draws additional support from other sworn testimony, quoted above,
23 of Mr. Fahrenkopf and Mr. Loss. *See* Statement of Reasons in MUR 5141 (Moran for Congress,

issued March 11, 2002) ("mere speculation . . . will not be accepted as true," and "a complaint may be dismissed if it consists of factual allegations that are refuted by sufficiently compelling evidence produced in responses to the complaint"). Because the complaint's mistaken reliance upon a single word, divorced from context, provides no grounds in this matter to question CPD's past or continuing eligibility to stage debates, there is no basis upon which to investigate whether it has forfeited the statutory and regulatory exemptions available to eligible staging organizations and, therefore, there is no reason to investigate the CPD's alleged violations of the Act's contribution and expenditure prohibitions and limitations, or its alleged failure to register and report as a political committee.

Based on the above, this Office recommends that the Commission find no reason to believe that the Commission on Presidential Debates violated 2 U.S.C. §§ 433, 434, 441a(a), 441a(f), or 441b(a), and close the file.

III. RECOMMENDATIONS

1. Find no reason to believe that the Commission on Presidential Debates violated 2 U.S.C. §§ 441b(a), 441a(a), 441a(f), 433, or 434.
2. Approve the appropriate letters.
3. Close the file.

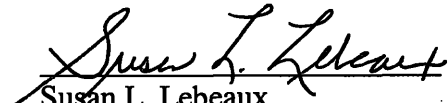
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